INDEX

	Page
Opinions below	1
Jurisdiction	1
Question presented	2
Statutes involved	2
Statement	3
Summary of argument	5
Argument	10
In cases governed by the Expediting Act, 28 U.S.C. 1292(b) does not grant the courts of appeals jurisdiction over appeals from interlocutory orders of the district courts	10
A. Application of Section 1292(b) to Expediting Act cases would result in an anomalous system of appellate review and would not relieve this Court of the burdens of direct review of those cases	12
B. On its face, Section 1292(b) of the Interlocutory Appeals Act does not confer jurisdiction upon the courts of appeals over appeals from interlocutory orders in Expediting Act cases	17
C. The Expediting Act of 1903 removes all court of appeals jurisdiction in government civil antitrust cases	20
D. Congress did not intend Section 1292(b) to be a partial repeal of the Expediting Act's bar on interlocutory appeals	26
Conclusion	32

CITATIONS

Cases: Page

Allen Calculators, Inc. v. *National Cash Register Co.*, 322 U.S. 137 23
Baltimore Contractors, Inc. v. *Bodinger*, 348 U.S. 176 16
Bank of Columbia v. *Sweeney*, 1 Pet. 567 26
Brown Shoe Co. v. *United States*, 370 U.S. 294 ..... 8, 24
Bulova Watch Co. v. *United States*, 365 U.S. 753 25
DeBeers Consolidated Mines, Ltd. v. *United States*, 325 U.S. 212 23
Farbenfabriken Bayer, A.G. v. *United States*, 1968 Trade Cases, ¶72,510 (C.A. D.C.) certiorari denied, 393 U.S. 959 11
Fisons Limited v. *United States*, 1972 Trade Cases ¶73,790, certiorari denied April 3, 1972, No. 71-971, O.T. 1971 ..... 11, 12, 17
Ford Motor Company v. *United States*, No. 70-113, decided March 29, 1972 15
Fourco Glass Co. v. *Transmirra Corp.*, 353 U.S. 222 18
Jones v. *Alfred H. Mayer Co.*, 392 U.S. 409 25
Posadas v. *National City Bank*, 296 U.S. 497 25
Shenandoah Valley Broadcasting, Inc. v. *American Society of Composers, Authors and Publishers*, 375 U.S. 39 20
United States Alkali Export Association, Inc. v. *United States*, 325 U.S. 196 23
United States v. *California Cooperative Canneries*, 279 U.S. 553 ..... 8, 20, 23

Cases—Continued Page

United States v. *Cities Service Co.*, 410 F.2d 662 ..... 16, 21, 25
United States v. *Crocker-Anglo National Bank*, 223 F. Supp. 849 10
United States v. *FMC Corp.*, 321 F.2d 534, application for stay denied by Mr. Justice Goldberg in chambers, 84 S. Ct. 4 ..... 4, 25
United States v. *Ingersoll-Rand Co.*, 320 F.2d 509 25
United States v. *Singer Manufacturing Co.*, 374 U.S. 174 15
Universal Interpretive Shuttle Corp. v. *Washington Transit Commission*, 393 U.S. 186 25

Statutes and regulations:

Clayton Act, 15 U.S.C. 18, Section 7 3
Evarts Act, 26 Stat. 828, as amended:
Section 7 (31 Stat. 660-661) 22
Expediting Act of 1903, 32 Stat. 823, as amended:
15 U.S.C. 28 10
15 U.S.C. 29 ..... 2, 7, 10, 20
Interlocutory Appeals Act, 62 Stat. 929, as amended in 1958, 72 Stat. 1770:
28 U.S.C. 1291 ..... 18, 19, 29, 30
28 U.S.C. 1292 ..... 6, 18, 19, 24
28 U.S.C. 1292(a) 6, 9, 11, 17, 18, 19, 24, 29, 30

Statutes and regulations—Continued Page

28 U.S.C. 1292(b) 2-3, 4, 5, 6, 7, 8, 9, 10, 11, 12, 13, 14, 15, 16, 17, 18, 19, 24, 26, 27, 28, 29, 30, 31

15 U.S.C. 15 29

28 U.S.C. 1253 13

49 U.S.C. 44 10

49 U.S.C. 45 10

Miscellaneous:

Barron & Holtzoff, *Federal Practice and Procedure* § 58.1, at p. 320 (Wright ed. 1960) 17

Comment, *Antitrust Expediting Act—A Critical Reappraisal*, 63 Mich. L. Rev. 1240 (1965) 20, 21

Comment, *Proposed Amendment to the Expediting Act Would Eliminate Direct Appeal to Supreme Court*, 39 N.Y.U. L. Rev. 319 16

Comment, 64 Colum. L. Rev. 592 (1964) 25

Comment, 77 Harv. L. Rev. 566 (1964) 25

36 Cong. Rec. 1679 20

104 Cong. Rec. 8002 27

116 Cong. Rec. 22738-22740 16

116 Cong. Rec. 33780 17

116 Cong. Rec. 38141, 40328 17

Frankfurter and Landis, *The Business of the Supreme Court* 258 (1928) 21

Hearings on H.R. 6238 before Subcommittee No. 3 of the House Committee on the Judiciary, 85th Cong., 2d Sess. 9 (1958) 29, 30

Miscellaneous—Continued Page

H.R. 6451, 81st Cong., 1st Sess. 16
H.R. 3516, 82d Cong., 1st Sess. 16
H.R. 6766, 87th Cong., 1st Sess. 16
H.R. 12807, 91st Cong., 1st Sess. 16, 17, 26
H.R. Rep. No. 1129, 91st Cong., 2d Sess. 4-7 (1970) 26
H.R. Rep. No. 1667, 85th Cong., 2d Sess. 2-4 (1958) 26, 28
9 *Moore's Federal Practice* ¶ 110.03[2], at pp. 64-65 (1970) 25
9 *Moore's Federal Practice* ¶ 110.22 [2], at p. 259 (1970) 17
Note, *Direct Appeals in Antitrust Cases*, 81 Harv. L. Rev. 1558 (1968) 20, 21
Report of the Proceedings of the Regular Annual Meeting of the Judicial Conference of the United States, 32-33 (1951) 27
Report of the Proceedings of the Regular Annual Meeting of the Judicial Conference of the United States 27-28 (1953) 28
Report of the Proceedings of a Special Meeting of the Judicial Conference of the United States 7 (1952) 28
S. 1181, 88th Cong., 1st Sess. 16
S. 1892, 88th Cong., 1st Sess. 16
S. 2621, 91st Cong., 1st Sess. 16
S. 2721, 90th Cong., 1st Sess. 16
S. Rep. No. 2434, 85th Cong., 2d Sess. (1958) 15, 28, 29
Wright, *Federal Courts*, 458 (1970) 16, 25

In the Supreme Court of the United States

OCTOBER TERM, 1972

No. 71-366

TIDEWATER OIL COMPANY, PETITIONER

v.

UNITED STATES OF AMERICA AND
PHILLIPS PETROLEUM COMPANY

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE UNITED STATES

OPINIONS BELOW

The opinion of the court of appeals (App. 3)[1] and the order and certification of the district court (App. 14-15) are not yet reported.

JURISDICTION

The judgment of the court of appeals was entered on July 28, 1971. The petition for a writ of certio-

[1] "App." refers to the joint appendix; "Pet. App." refers to the appendix to the petition for a writ of certiorari.

rari, filed on September 13, 1971, originally was denied on November 9, 1971 (404 U.S. 941). On March 20, 1972, the order denying the petition was vacated and the petition was granted. The jurisdiction of this Court rests on 28 U.S.C. 1254 or on 28 U.S.C. 1651(a).[2]

QUESTION PRESENTED

Whether, in a civil antitrust action brought by the United States, a court of appeals is barred by the Expediting Act, 15 U.S.C. 29, from asserting jurisdiction over an interlocutory appeal certified pursuant to the Interlocutory Appeals Act, 28 U.S.C. 1292(b).

STATUTES INVOLVED

Section 2 of the Expediting Act of 1903, 32 Stat. 823, as amended, 15 U.S.C. 29, provides:

> In every civil action brought in any district court of the United States under any of said [Antitrust] Acts, wherein the United States is complainant, an appeal from the final judgment of the district court will lie only to the Supreme Court.

The Interlocutory Appeals Act, 62 Stat. 929, as amended in 1958, 72 Stat. 1770, 28 U.S.C. 1292(b), provides:

> (b) When a district judge, in making in a civil action an order not otherwise appealable

---

[2] See Brief for the United States in opposition, at 1-2, n. 1.

under this section, shall be of the opinion that such order involves a controlling question of law as to which there is substantial ground for difference of opinion and that an immediate appeal from the order may materially advance the ultimate termination of the litigation, he shall so state in writing in such order. The Court of Appeals may thereupon, in its discretion, permit an appeal to be taken from such order, if application is made to it within ten days after the entry of the order; *Provided, however,* That application for an appeal hereunder shall not stay proceedings in the district court unless the district judge or the Court of Appeals or a judge thereof shall so order.

STATEMENT

The relevant facts are not in dispute. On July 13, 1966, the United States filed a civil antitrust suit against Phillips Petroleum Company ("Phillips") and petitioner Tidewater Oil Company ("Tidewater"), alleging that the acquisition by Phillips of certain assets and operations of Tidewater pursuant to an earlier agreement would violate Section 7 of the Clayton Act, 15 U.S.C. 18 (App. 16-24). At the same time, the United States moved for a temporary restraining order and a preliminary injunction to prevent consummation of the acquisition. The following day, the district court denied the temporary restraining order and Tidewater transferred title to its Western Marketing Manufacturing Division to Phillips (Pet. App. C, at 4-7). On November 1, 1966, the district court denied the government's motion for a preliminary injunction, which

sought either rescission of the transaction or maintenance by Phillips of the going concern value of the transferred assets and operations (Pet. App. C, at 17).

Tidewater continued as a party during the ensuing five years of pretrial discovery and preparation.[3] In April 1971, following the government's announcement that it had completed discovery and was prepared for trial, Tidewater moved for its dismissal as a party (Pet. App. D, at 19).[4] The district court denied the motion, but certified its order "for interlocutory appeal under Section 1292(b) of Title 28 of the United States Code" (App. 14-15). The Court of Appeals for the Ninth Circuit denied *per curiam* Tidewater's petition for leave to appeal under Section 1292(b), relying upon its earlier decision in *United States* v. *FMC Corporation*, 321 F.2d 534 (C.A. 9), which held that the court of appeals had no jurisdiction over an appeal from an interlocutory order in a government civil antitrust case.

---

[3] Tidewater merged with the Getty Oil Company on September 30, 1967, a fact without legal consequence in this proceeding (App. 7).

[4] Tidewater claimed "that Section 7 of the Clayton Act is directed only against the acquiring corporation and not against the seller, that the sale of assets by defendant Tidewater Oil Company to Phillips Petroleum Company has long ago been consummated, that no relief is obtainable against Tidewater Oil Company, and that its presence in the suit is no longer necessary or appropriate" (Pet. App. D, at 19).

SUMMARY OF ARGUMENT

A

If, as Tidewater contends, 28 U.S.C. 1292(b) permits interlocutory appeals to the courts of appeals in Expediting Act cases the result would be an anomalous system of appellate review. Under Section 1292(b), the courts of appeals would be deciding controlling questions of law in cases where they have no jurisdiction to review the final judgment. This would be an unprecedented deviation from traditional federal appellate practice where the court that decides the interlocutory appeal also subsequently decides the final appeal, thereby ensuring that if the trial proceeds as ordered on the interlocutory appeal it will not be undone upon a later appeal involving the same issue.

Moreover, applying Section 1292(b) to Expediting Act cases would not reduce this Court's burden in deciding direct appeals, as Tidewater claims; to the contrary, this would increase the Court's workload. The number of Expediting Act cases where direct review may be had would remain the same, but the parties would also be able to seek review by this Court through certiorari after an adverse decision in the court of appeals on the interlocutory appeal. This Court would therefore have to consider the case twice. If the Court found the decision below questionable it would then have to decide whether to deny certiorari, thus allowing the trial to proceed on a possibly erroneous basis only to be reversed

later upon direct appeal from the final judgment, or to grant certiorari to review the interlocutory order, after which the case would return again upon direct appeal.

All this illustrates that the purpose of permitting interlocutory appeals is to alleviate the burden on litigants and trial courts caused by strict adherence to the rule of finality, not to reduce the burden on appellate courts, especially since piecemeal appeals may have the opposite effect. If the Expediting Act should be changed, this should be done by substituting a new, comprehensive system of appellate review. Meaningful revision cannot be accomplished by misapplying existing statutes that have been designed for other purposes.

B

On its face, Section 1292(b) of the Interlocutory Appeals Act indicates that the courts of appeals have no jurisdiction over appeals from interlocutory orders in Expediting Act cases. Section 1292(b) is concerned only with orders other than those involving injunctions since these are dealt with specifically in Section 1292(a), which expressly excludes court of appeals jurisdiction in Expediting Act cases. If Section 1292(b) applied in this case, it would mean that an interlocutory order in a government civil antitrust action could be appealed to the courts of appeals if—and only if—it did not involve an injunction. But that would turn the Interlocutory Appeals Act on its head because in non-Expediting Act cases

Section 1292 gives priority to injunction orders, which may be appealed as of right.

It is highly improbable that Congress intended such a result. And it is at least equally unlikely that the oblique reference to "civil action" in Section 1292 (b) includes cases where the Expediting Act had precluded court of appeals jurisdiction for more than fifty years, particularly since the language of Section 1292(b) focuses on the kind of decree issued by the district court instead of the kind of case in which the decree is entered.

These considerations militate in favor of construing the language of Section 1292(b)—"in a civil action an order not otherwise appealable under this section" —to mean an order in the type of civil action where the court of appeals would have jurisdiction to review the final judgment or an interlocutory order involving an injunction. This obviously does not include Expediting Act cases, which are specifically exempted from court of appeals jurisdiction in both instances.

C

Section 2 of the Expediting Act of 1903 provides that in a government civil antitrust action, "an appeal from the final judgment will lie only to the Supreme Court." The Act has two basic purposes: (1) to eliminate the delays of intermediate appellate review; and (2) to ensure that only this Court will decide appeals in these cases because of their importance and in order to ensure nationwide uniformity in the antitrust laws.

Although the Expediting Act expressly refers only to final judgments, the Act also removes court of appeals jurisdiction with respect to interlocutory orders since, at the time Congress passed the Act, the courts of appeals could review interlocutory orders only in cases where they could review the final judgment. From *United States* v. *California Cooperative Canneries*, 279 U.S. 553, 548, to *Brown Shoe Co.* v. *United States*, 370 U.S. 294, 305 n. 9, this Court has consistently recognized that the courts of appeals may not exercise jurisdiction in Expediting Act cases, regardless of whether the appeal is from a final or interlocutory order.

Since it should not be assumed that Congress repealed this basic policy and longstanding interpretation of the Expediting Act by implication, to allow interlocutory appeals to the courts of appeals in these cases would be to evade the congressional will expressed in that Act—unless in passing Section 1292 (b) Congress specifically addressed itself to appeals in these cases, which it did not.

D

There is no mention of the Expediting Act or the cases governed by it in the legislative history of Section 1292(b). This is so because Congress enacted Section 1292(b) only for the purpose of expanding the category of appealable interlocutory orders in cases where the courts of appeals had jurisdiction to review the final judgment. Congress believed that since any appeal would eventually be to the courts

of appeals, those courts ought to be able to enter the case at an earlier stage when this would advance ultimate termination of the litigation. The legislative history shows that the language in Section 1292 (b)—"an order not otherwise appealable under this section" in a "civil action"—means an interlocutory order not within Section 1292(a) in a case where the court of appeals would have jurisdiction to review the final judgment; this is the premise upon which Congress legislated.

The purposes of the Expediting Act and Section 1292(b) are not the same. In the Expediting Act Congress sought to expedite government civil antitrust cases in a particular way—by routing appeals directly to this Court and by permitting appeals only from final judgments. Moreover, the other basic purpose of the Expediting Act was to ensure exclusive review by this Court because Congress viewed these cases as particularly important and also desired uniform appellate decisions on the antitrust issues presented. Application of Section 1292(b) to Expediting Act cases would be in direct conflict with both policies, particularly since the courts of appeals would be deciding only controlling questions of law. Since there is nothing in the language, policy or legislative history of Section 1292(b) to indicate that its purpose was to repeal, in part, the Expediting Act, Section 1292(b) should not be interpreted to confer jurisdiction upon the court of appeals in this case.

ARGUMENT

IN CASES GOVERNED BY THE EXPEDITING ACT, 28 U.S.C. 1292(b) DOES NOT GRANT THE COURTS OF APPEALS JURISDICTION OVER APPEALS FROM INTERLOCUTORY ORDERS OF THE DISTRICT COURTS

Section 2 of the Expediting Act of 1903, 15 U.S.C. 29,[5] provides that "In every civil action brought in any district court of the United States under any of [the Antitrust] Acts, wherein the United States is complainant, an appeal from the final judgment of the district court will lie only to the Supreme Court."[6] In this case, the district court's order is not a "final judgment" and is therefore not appealable to this Court. But Tidewater claims that it may nevertheless appeal to the court of appeals.

Tidewater relies upon 28 U.S.C. 1292(b), the 1958 amendment to the Interlocutory Appeals Act, which permits an appeal to the court of appeals, in its discretion, "[w]hen a district judge, in making in a civil action an order not otherwise appealable under this section, shall be of the opinion that such an order involves a controlling question of law as to which there is substantial ground for difference of opinion and that an immediate appeal from the order may materially advance the ultimate termination of

---

[5] See also 49 U.S.C. 45.

[6] Under Section 1 of the Act, 15 U.S.C 28 (see also 49 U.S.C. 44), if the Attorney General certifies that the case is of "general public importance" a three-judge district court must be convened. The Attorney General rarely exercises his option under Section 1. But see *United States* v. *Crocker-Anglo National Bank*, 223 F. Supp. 849 (N.D. Cal.).

the litigation * * *", and so certifies. The phrase in Section 1292(b)—"in a civil action an order not otherwise appealable under this section" — refers to Section 1292(a), which permits an appeal as of right to the court of appeals from an interlocutory order of the district court granting, modifying or refusing an injunction,[7] except in cases "where a direct review may be had in the Supreme Court."

Thus, the question presented by this case is whether by Section 1292(b) Congress partially repealed, *sub silentio*, the provision of the Expediting Act giving this Court exclusive jurisdiction over appeals in civil antitrust actions brought by the United States. Courts of appeals for two different circuits, the Ninth in the present case and the District of Columbia in *Farbenfabriken Bayer, A.G.* v. *United States*, 1968 Trade Cases ¶ 72,510 (C.A. D.C.), certiorari denied, 393 U.S. 959, have held that the Expediting Act continues in full force and that the courts of appeals have no jurisdiction over interlocutory appeals in such cases. Recently, the Court of Appeals for the Seventh Circuit reached a contrary conclusion, holding that "the efficacious purpose of § 1292(b) to expedite the termination of protracted cases justifies its application in government antitrust litigation as well as in other similarly complex matters." *Fisons Limited* v. *United States*, 1972 Trade Cases ¶73,790, at p. 91,346, certiorari denied April 3, 1972, No. 71-971, O.T. 1971.

---

[7] Section 1292(a) also permits appeals from certain interlocutory orders in bankruptcy, admiralty and patent infringement cases.

The holding in the *Fisons* case, we believe, misconstrues the language of Section 1292(b) and incorrectly assumes that the policy considerations underlying the Expediting Act and the Interlocutory Appeals Act are identical. When Congress enacted Section 1292(b) in 1958 without mentioning the Expediting Act or giving any indication that the Act had been considered, the Expediting Act's bar to interlocutory and final appeals to the court of appeals had been an accepted fact for more than five decades. Congress has not yet amended the Expediting Act and, until it does so, the Act continues to bar court of appeals review in government civil antitrust cases.

A. Application of Section 1292(b) to Expediting Act Cases Would Result in an Anomalous System of Appellate Review and Would Not Relieve This Court of the Burdens of Direct Review of Those Cases

When the meaning of a statute is in dispute, litigants usually begin with the statutory language, proceed to the legislative history, and finish by examining the foreseeable effects of the particular interpretation they support. In this case, however, we find it appropriate to follow a somewhat different approach. Proper analysis of the interplay of the Expediting Act and Section 1292(b) of the Interlocutory Appeals Act, in light of their language and legislative history, requires considerable detail. But the thrust of Tidewater's argument is that all indications that Congress did not include Expediting

Act cases within Section 1292(b) should be viewed with a hostile eye or ignored entirely because the result Tidewater seeks is so desirable. Since we believe the major premise of this argument is erroneous, we shall begin by considering the system of appellate review for government civil antitrust cases that would result from Tidewater's reading of Section 1292(b). This approach will place the rather complicated arguments relating to the statutory language in proper perspective and, we believe, aid the Court in resolving them.

If, as Tidewater contends, Section 1292(b) permits appeals to the courts of appeals from interlocutory orders in Expediting Act cases this would constitute an unprecedented deviation from traditional federal appellate procedures. There is no other area of federal law where, in the same case, the intermediate appellate courts have jurisdiction over interlocutory appeals when controlling questions of law are presented, while this Court has sole jurisdiction over an appeal from the final judgment when the case is ended.[8] And there would be little to commend such an appellate system.

Since a final order would not be reviewed by the courts of appeals, the decision of that court on a "controlling question of law" under Section 1292(b) would no more settle the matter than the decision

---

[8] When Congress has permitted interlocutory appeals in cases where direct review may be had in this Court, it has required those appeals to be taken to this Court. See 28 U.S.C. 1253.

of the district judge. The courts of appeals would be acting as mere consultants to the district judges on issues about which they had no authority to speak with finality. By contrast, in other cases when the trial proceeds in accordance with a court of appeals decision on an interlocutory order, there is assurance that this will not be undone upon appeal since the same court would review the final order.*

Tidewater suggests that allowing courts of appeals to review interlocutory orders under Section 1292(b) in Expediting Act cases would nevertheless be desirable because it "would be an enormous service to this Court in lightening its burden and in enlisting the screening agency of intermediate appellate courts" (Brief, at p. 25). Even if correct, this consideration would not justify ignoring the limitation in the Expediting Act or interpreting Section 1292 (b) contrary to what Congress intended. But in any event, the salutary effects Tidewater envisages are non-existent; indeed, applying Section 1292(b) to Expediting Act cases would tend to increase, rather than decrease, this Court's burden.

Regardless of what the courts of appeals decided on the interlocutory appeals, the number of cases where direct appeal would lie to this Court would remain the same. Upon direct appeal, this Court would still have to determine the issue decided by the

---

* The possibility of this happening at all would be present only in the relatively few instances where this Court granted certiorari; in some of those cases review might be had of the interlocutory decision of the court of appeals.

court of appeals.[10] Moreover, since the courts of appeals would be deciding only controlling questions of law, it appears likely that a party would petition for certiorari from an adverse decision. And that means this Court would have to consider the case at least twice, first upon the petition for a writ of certiorari and then upon direct appeal from the final judgment. If the Court found the appellate decision questionable, it would then be faced with the choice of denying certiorari and awaiting a direct appeal, thus allowing the trial to proceed on a possibly erroneous basis, or granting certiorari to review the interlocutory order, after which the case would return again upon direct appeal.[11]

---

[10] Although it is possible that on direct appeal a party may not argue the issue decided in the interlocutory appeal, this seems improbable since the only issue that may be reviewed under Section 1292(b) is "a controlling question of law as to which there is substantial ground for difference of opinion * * *."

[11] Even the supposed general benefit to this Court from having Expediting Act cases routed through the courts of appeals is scarcely compelling in these limited circumstances. Members of this Court have pointed to the desirability of having the courts of appeals perform a "screening" function to alleviate the burden on this Court caused by direct review of cases involving such complex factual issues. See *Ford Motor Co.* v. *United States*, No. 70-113, decided March 29, 1972 (Mr. Chief Justice Burger, dissenting); *United States* v. *Singer Manufacturing Co.*, 374 U.S. 174, 175. But the questions decided by the courts of appeals under Section 1292(b) will most frequently involve procedural matters, which presumably do not require extensive analysis of the record. See S. Rep. No. 2434, 85th Cong., 2d Sess. 2-3 (1958).

All this simply illustrates the point that interlocutory appeals are allowed not for the purpose of alleviating the burden on appellate courts, since it is likely that such appeals would have precisely the opposite effect. Instead, Congress has in the past relaxed the rule of finality because of the burden on litigants and trial courts when appeals are permitted only from final orders. See *Baltimore Contractors, Inc.* v. *Bodinger*, 348 U.S. 176, 181; Wright, *Federal Courts* 458-459 (1970). If Congress had passed Section 1292(b) with the intention of partially repealing the Expediting Act in order to decrease the workload of this Court, which is not the case, it would have chosen a poor, if not counterproductive, method of achieving its objective.

As the First Circuit concluded in a related case, although the Expediting Act may be "a prime candidate for revision * * * the patient demands a more extensive cure than that suggested by" Tidewater. *United States* v. *Cities Service Co.*, 410 F.2d 662, 669-670. If the Expediting Act is to be revised, this should be done by substituting a new, comprehensive system for antitrust appeals.[12] Meaningful revision

---

[12] Since 1949 Congress has considered a number of proposals to amend or repeal the Expediting Act. H.R. 6451, 81st Cong., 1st Sess.; H.R. 3516, 82d Cong., 1st Sess.; H.R. 6766, 87th Cong., 1st Sess.; S. 1811, 88th Cong., 1st Sess.; S. 1892, 88th Cong., 1st Sess.; S. 2721, 90th Cong., 1st Sess.; H.R. 12807, 91st Cong., 1st Sess.; S. 2621, 91st Cong., 1st Sess. See Comment, *Proposed Amendment to the Expediting Act Would Eliminate Direct Appeal to Supreme Court*, 39 N.Y.U. L. Rev. 319. The House of Representatives passed H.R. 12807 on July 6, 1970, 116 Cong. Rec. 22738-22740, and the Senate

cannot be accomplished by sporadic misapplication of statutes that have been designed for other purposes. The language and legislative history of the Expediting Act and of Section 1292(b) show that this is what Tidewater seeks.

B. On Its Face, Section 1292(b) of the Interlocutory Appeals Act Does Not Confer Jurisdiction Upon the Courts of Appeals Over Appeals From Interlocutory Orders In Expediting Act Cases

In Section 1292(a) of the Interlocutory Appeals Act Congress had already dealt with the appealability of interlocutory injunction orders and Section 1292(b) is thus concerned only with orders other than those involving injunctions.[13] Section 1292(a)(1) specifically excludes review by the courts of appeals of interlocutory orders dealing with injunctions in cases such as those within the Expediting Act where this Court has direct review of the final judgment.[14] Since there is nothing that

---

passed an amended version of H.R. 12807 on September 25, 1970. 116 Cong. Rec. 33780. Neither version provided for interlocutory appeals under Section 1292(b). Conferees were appointed to discuss differences in the Senate and House version, 116 Cong. Rec. 38141, 40328, but no conference report was issued.

[13] See Barron & Holtzoff, *Federal Practice and Procedure* § 58.1, at p. 320 (Wright ed. 1960), 9 *Moore's Federal Practice* ¶ 110.22[2], at p. 259 (2d ed. 1970). *Fisons Limited* v. *United States*, 1972 Trade Cases ¶ 73,790 at p. 91,345 (C.A. 7), certiorari denied April 3, 1972, No. 71-971, O.T. 1971, on which Tidewater relies, appears to agree, although the opinion is not clear on this point.

[14] See p. 11 *supra*.

contradicts this express exclusion in the language of Section 1292(b),[18] interlocutory injunction orders in Expediting Act cases are likewise not appealable under Section 1292(b).

On the other hand, there is no doubt that Section 1292(b) does apply to interlocutory orders in civil actions where the courts of appeals would have had jurisdiction under Section 1292(a)(1) if the order involved an injunction or Section 1291 if the order were "final," 28 U.S.C. 1291. However, to read Section 1292(b) as going beyond this to include the appeal here would require an implausible construction. It would mean that interlocutory orders in government civil antitrust actions are appealable to the courts of appeals under Section 1292(b) so long as the orders do not grant, modify, or refuse an injunction. But that turns the entire statute on its head because in non-Expediting Act cases Section 1292 gives priority to review of injunction orders, which may be appealed as of right.

Tidewater contends, however, that when Congress referred to an order in a "civil action" it meant interlocutory orders in all civil actions, including those where the Expediting Act had precluded review by the courts of appeals for more than fifty years. But such a marked departure is scarcely signalled by the oblique reference to "civil action," especially since the language of Section 1292(b) focuses not on the kind of case involved, but on the nature of

[18] See *Fourco Glass Co.* v. *Transmirra Corp.*, 353 U.S. 222, 228-229.

the decree issued by the district court. This in itself indicates that Congress simply sought to relax further the requirements of finality, as it had done in Section 1292(a), rather than expand court of appeals jurisdiction to cover cases in which those courts previously had no jurisdiction regardless of the nature of the order at issue.

Moreover, underlying Tidewater's interpretation is the somewhat abstruse proposition that Section 1292(b) creates an exception to the general exception of Expediting Act cases from review by the courts of appeals. It is difficult to believe Congress could have legislated on that basis and harder still to say why it would not have been more explicit about the matter.

All this militates in favor of construing the language in Section 1292(b)—"in a civil action an order not otherwise appealable under this section"—to mean an order in the type of civil action where the court of appeals would have had jurisdiction over the appeal under Section 1291 if the order were "final" or under Section 1292(a) if the order were of the kind there specified. Obviously this excludes Expediting Act cases since both Section 1291 and Section 1292(a) exempt those actions from court of appeals jurisdiction. That this is the true construction is confirmed by the legislative history of the Expediting Act and Section 1292, and by the abnormal and, in our view, unsound system of appellate review that would result from a contrary interpretation, which we have discussed above.

C. The Expediting Act of 1903 Removes All Court of Appeals Jurisdiction in Government Civil Antitrust Cases

Congress passed the Expediting Act of 1903 in order to "expedite litigation of great and general importance." 36 Cong. Rec. 1679 (remarks of Senator Fairbanks). Congress believed that civil antitrust actions instituted by the United States would be likely to present significant issues and concluded that there should be prompt resolution of these issues by this Court.[16] Section 2 of the Expediting Act seeks to accomplish this goal by providing that in every civil antitrust case where the United States is the complainant, "an appeal from the final judgment will be only to the Supreme Court."

The Expediting Act eliminated the usual delays of intermediate appellate review;[17] indeed, this was

---

[16] Several commentators have concluded that Congress did not include private civil antitrust suits because this class of cases would not present as far-reaching antitrust issues as government cases. See Note, *Direct Appeals in Antitrust Cases*, 81 Harv. L. Rev. 1558, 1561-1562 (1968); Comment, *Antitrust Expediting Act—A Critical Reappraisal*, 63 Mich. L. Rev. 1240, 1243, n. 29 (1965); cf. *Shenandoah Valley Broadcasting, Inc.* v. *American Society of Composers, Authors and Publishers*, 375 U.S. 39, 40.

[17] As Mr. Justice Brandeis stated for the Court in *United States* v. *California Cooperative Canneries*, 279 U.S. 553, 558:

> Before the passage of the Expediting Act the opportunities for delay were many. From a final decree in the trial court under the Anti-Trust Act an appeal lay to the Circuit Court of Appeals; and six months were allowed for taking the appeal. From the judgment of the Court of Appeals an appeal lay to this Court; and one year was

one of the main functions of the legislation. Of course, Congress might have accomplished the same objective by prescribing procedures to speed these cases through the courts of appeals. But Congress did not simply desire speed for speed's sake. It had another, equally significant purpose: "to facilitate review by the Supreme Court of a class of antitrust cases deemed particularly important." *United States v. Cities Service Co., supra,* 410 F.2d at 664; Note, *Direct Appeals in Antitrust Cases,* 81 Harv. L. Rev. 1558, 1560-1571 (1968); Comment, *Antitrust Expediting Act — A Critical Reappraisal,* 63 Mich. L. Rev. 1240, 1241-1243 (1965). Congress' unwillingness to assign jurisdiction to the circuit courts of appeals over those antitrust cases likely to raise important and novel issues is understandable in light of prevailing reservations about the new federal appellate courts, which in 1903 had been in existence only twelve years. See Frankfurter and Landis, *The Business of the Supreme Court* 258 (1928). This, together with the desire to obtain uniform nation-wide judicial interpretation of the antitrust laws, led to passage of the Expediting Act of 1903.

Although the Expediting Act expressly speaks only of final judgments, the Act also removed court of

---

allowed for taking that appeal. Act of March 3, 1891, c. 517, §§ 6, 11, 26 Stat. 826, 828, 829. [Citations omitted.] Moreover, there might be an appeal to the Circuit Court of Appeals from a decree granting or denying an interlocutory injunction. Act of June 6, 1900, c. 803, 31 Stat. 660.

appeals jurisdiction to review interlocutory orders in government civil antitrust cases. When Congress enacted the Expediting Act, interlocutory orders could be appealed to the courts of appeals only under Section 7 of the Evarts Act, 26 Stat. 828, as amended, 31 Stat. 660, which permitted the courts of appeals to review interlocutory injunctive orders and the appointment of receivers in cases in which the courts of appeals had jurisdiction to review final orders.[18] By eliminating court of appeals jurisdiction to review final orders in government civil antitrust cases, the Expediting Act therefore also removed court of appeals jurisdiction to review interlocutory orders in those cases. Congress omitted any reference to interlocutory appeals in the Expediting Act for the

---

[18] Section 7 of the Evarts Act provided as follows (31 Stat. 660-661):

> That where, upon a hearing in equity in a district court or in a circuit court, or by a judge thereof in vacation, an injunction shall be granted or continued or a receiver appointed, by an interlocutory order or decree, in a cause in which an appeal from a final decree may be taken under the provisions of this Act to the circuit court of appeals, an appeal may be taken from such interlocutory order or decree granting or continuing such injunction or appointing such receiver to the circuit court of appeals: *Provided*, That the appeal must be taken within thirty days from the entry of such order or decree, and it shall take precedence in the appellate court; and the proceedings in other respects in the court below shall not be stayed, unless otherwise ordered by that court, or by the appellate court or a judge thereof, during the pendency of such appeal: *Provided further*, That the court below may in its discretion require as a condition of the appeal an additional bond.

obvious reason that such language would have been superfluous.

Thus, as Mr. Justice Brandeis stated for the Court in *United States* v. *California Cooperative Canneries*, 279 U.S. 553, 558:

> These [Evarts Act] provisions governing appeals in general were amended by the Expediting Act so that in suits in equity under the Anti-Trust Act "in which the United States is complainant," the appeal should be direct to this Court from the final decree in the trial court. Thus, Congress limited the right of review to an appeal from the decree which disposed of all matters, see *Collins* v. *Miller*, 252 U.S. 364; and *it precluded the possibility of an appeal to either court from an interlocutory decree.* [Emphasis added.]

The Court reaffirmed this conclusion in *Allen Calculators, Inc.* v. *National Cash Register Co.*, 322 U.S. 137, 142, stating that "jurisdiction to review District Court decrees was not vested in the Circuit Courts of Appeals but solely in this court, and [the Expediting Act] limited the right of appeal to final decrees." Later, *United States Alkali Export Association, Inc.* v. *United States*, 325 U.S. 196, 203, and *DeBeers Consolidated Mines, Ltd.* v. *United States*, 325 U.S. 212, 217 (see also *id.* at 223-225 (Mr. Justice Douglas dissenting)), held that interlocutory orders in Expediting Act cases could be reviewed by extraordinary writs under 28 U.S.C. 1651 issued by this Court, where "sole appellate jurisdiction lies," 325 U.S. at 202—even though, as in *DeBeers*, the order was a preliminary injunction ordinarily reviewable by the

courts of appeals under 28 U.S.C. 1292(a)(1). Finally, in *Brown Shoe Co.* v. *United States*, *supra*, 370 U.S. at 304-306, the Court reiterated that a final judgment is a necessary prerequisite for appeal in Expediting Act cases because "Congress * * * limited the right to review in such cases to an appeal from a decree which disposed of all matters, and it precluded the possibility of an appeal either to this Court or to a Court of Appeals from an interlocutory decree." *Id.* at 305 n. 9.[19]

Thus, as this Court has consistently recognized for nearly half a century, and as the Expediting Act and its legislative history plainly show, Congress has adhered to a firm policy against permitting the courts of appeals to exercise any jurisdiction over Expediting Act cases. Against the specific direction in the Expediting Act with respect to appeals in government civil antitrust cases, Tidewater offers only the general language of 28 U.S.C. 1292(b) regarding interlocutory appeals in civil actions. Yet "it is familiar law that a specific statute controls over a general one 'without regard to priority of en-

---

[19] See also *id.* at 355 (Mr. Justice Clark, concurring); *id.* at 357-365 (Mr. Justice Harlan dissenting in part and concurring in part).

While Section 1292 was not directly at issue in *Brown Shoe*, the Court expressly held that unless the district court's decree was "final" it would not be appealable—and this must mean appealable to any court, which would not be so if Section 1292 applied. See 370 U.S. at 309 ("* * * holding the decree of the District Court in the instant case less than 'final' and, thus, not appealable, would require a departure from a settled course of the Court's practice.").

actment.' *Townsend* v. *Little*, 109 U.S. 504, 512. See, *e.g.*, *Ginsberg & Sons* v. *Popkin*, 285 U.S. 204, 208; *MacEvoy Co.* v. *United States*, 322 U.S. 102, 107; *Fourco Glass Co.* v. *Transmirra Corp.*, 353 U.S. 222, 228-229." *Bulova Watch Co.* v. *United States*, 365 U.S. 753, 758. And this Court has often reminded that "repeals by implication are not favored." *Posadas* v. *National City Bank*, 296 U.S. 497, 503; see, *e.g.*, *Jones* v. *Alfred H. Mayer Co.*, 392 U.S. 409, 437; *Universal Interpretive Shuttle Corp.* v. *Washington Transit Commission*, 393 U.S. 186, 193. Since it therefore cannot be assumed that the "clear policy [of the Expediting Act] was altered by indirection," [30] to allow interlocutory appeals to the courts

---

[30] *United States* v. *Cities Service Co.*, *supra*, 410 F. 2d at 664. In *Cities Service*, the court rejected the government's contention that the revisions to Section 1292(a) indicated that Congress had created a limited exception for interlocutory injunctive appeals in Expediting Act cases. The United States had previously advanced that contention successfully in *United States* v. *Ingersoll-Rand Co.*, 320 F. 2d 509 (C.A. 3), and unsuccessfully in *United States* v. *FMC Corp.*, 321 F. 2d 534 (C.A. 9), application for stay denied by Mr. Justice Goldberg in chambers, 84 Sup. Ct. 4.

The United States has reviewed its position with respect to appeals under Section 1292(a)(1) in light of the decisions and no longer adheres to its previous position. See Wright, *Federal Courts* 472 (1970); 9 *Moore's Federal Practice* ¶ 110.03[2], at pp. 64-65 (1970); Comment, 77 Harv. L. Rev. 566 (1964); Comment, 64 Colum. L. Rev. 592 (1964).

The Attorney General has supported legislation that would amend the Expediting Act to eliminate direct appeals to this Court except in cases of general public importance and to allow appeals to the courts of appeals from interlocutory injunction orders; on such appeals, the courts of appeals

of appeals in Expediting Act cases would be to evade the congressional will expressed in that Act [21]—unless in passing Section 1292(b) Congress specifically addressed itself to appeals in these cases, which it did not, as we next discuss.

D. Congress Did Not Intend Section 1292(b) to Be A Partial Repeal of the Expediting Act's Bar on Interlocutory Appeals

In order for Tidewater's interpretation to prevail, this Court must conclude that in Section 1292(b), the 1958 amendment to the Interlocutory Appeals Act, Congress not only rejected the policies underlying the Expediting Act of 1903 by allowing interlocutory appeals, but also carved out an exception to this Court's exclusive jurisdiction by restoring, in

---

would not be considering the ultimate merits of the case and, therefore, their exercise of jurisdiction would not be inconsistent with subsequent direct review by this Court of the final judgment. See H.R. Rep. No. 1129, 91st Cong., 2d Sess. 4-7 (1970). In his letter to the House Judiciary Committee, the Attorney General added that in cases subject to direct review in this Court, any amendment to the Expediting Act should not permit appeals pursuant to Section 1292(b), which authorizes the courts of appeals to decide the merits of controlling questions of law. *Id.* at 7 ("It would be anomalous for the courts of appeals to undertake interlocutory resolution of such issues when, at the end of trial, if a certificate is filed, the final judgment would go directly to the Supreme Court.").

As reported out of the House Judiciary Committee, the bill (H.R. 12807, see note 12 *supra*) provided in part that: "Any appeal from an interlocutory order entered in [a government civil antitrust] action shall be taken to the court of appeals pursuant to sections 1292(a)(1) and 2107 of title 28 of the United States Code but not otherwise." *Id.* at 10-11.

[21] See *Bank of Columbia* v. *Sweeney*, 1 Pet. 567, 569.

part, appellate jurisdiction to the courts of appeals in government civil antitrust cases. If Congress had intended Section 1292(b) to authorize such a significant departure from the policies followed for more than five decades, one could reasonably expect an explicit reference to the Expediting Act in the statute itself or, at the least, discussion of the matter in the legislative history. But there is neither. Indeed, there is no mention of the Expediting Act or the cases under it in the history surrounding Section 1292(b)[22] and the reason for this is apparent: Congress did not include civil antitrust cases governed by the Expediting Act within Section 1292(b).

The history of Section 1292(b) begins in 1951, when Judge Jerome Frank proposed to the Judicial Conference of the United States a new statute to permit, if "necessary or desirable to avoid substantial injustice," interlocutory appeals "[i]n addition to appeals from interlocutory orders * * * permitted as of right under section 1292 * * *."[23] A committee formed to study this proposal later recommended against it because of the danger of encouraging frivolous appeals, but suggested consideration of fur-

---

[22] This includes the Reports of the Judicial Conference, notes 23 to 25 *infra;* the hearings on the statute, note 28 *infra;* the House and Senate Reports, note 25 *infra;* and the only remarks on the floor of Congress dealing with Section 1292(b), 104 Cong. Rec. 8002 (1958) (Rep. Keating).

[23] *Report of the Proceedings of the Regular Annual Meeting of the Judicial Conference of the United States* 32-33 (1951).

ther proposals on the subject.[24] In 1953, the committee submitted, and the Judicial Conference approved, the provision that in 1958 Congress adopted without change as Section 1292(b).[25]

The Senate Report on Section 1292(b) directs attention to the gap left by allowing appeals with respect to certain interlocutory orders and by requiring a final judgment as a prerequisite to court of appeals review in all other cases:[26]

> The bill results from a growing awareness of the need for expedition of cases pending before the district courts. Many cases which are filed in the Federal district courts require the district judge to entertain motions at an early stage in the proceedings which, if determined, against the plaintiff, *result in a final order which would then be appealable to the circuit courts of appeals of the United States.* However, *such motions*, if determined in the plaintiff's favor, are interlocutory since they do not end the litigation and are not therefore, under existing provisions of law, appealable. [Emphasis supplied.]

---

[24] *Report of the Proceedings of a Special Meeting of the Judicial Conference of the United States* 7 (1952).

[25] *Report of the Proceedings of the Regular Annual Meeting of the Judicial Conference of the United States* 27-28 (1953). The committee's report to the Judicial Conference is reprinted in the House and Senate Reports on Section 1292(b). H.R. Rep. No. 1667, 85th Cong., 2d Sess. 2-4 (1958) [hereinafter House Report]; S. Rep. No. 2434, 85th Cong., 2d Sess. 6-8 (1958) [hereinafter Senate Report].

[26] Senate Report 2.

The reference to district court orders on "such motions" is addressed only to cases where appeals from final judgments would go to the courts of appeals. That Section 1292(b) covers only such cases, and does not have the broader purpose of partially repealing the Expediting Act, is further indicated by the Senate Report's examples of when an interlocutory appeal would be desirable:[27]

> Disposition of antitrust cases may take considerable time, *yet upon appeal following final disposition of such cases, the court of appeals may well determine* that the statute of limitations had run and for that reason the district court did not have jurisdiction. (Emphasis supplied.)[28]

Thus, the purpose of Section 1292(b) was to expand the category of appealable interlocutory orders in cases where the courts of appeals had jurisdiction to review the final judgment.[29] In such cases, which

---

[27] *Id.* at 3.

[28] The reference to "antitrust cases" is to private treble damage suits, see 15 U.S.C. 15, as Tidewater itself recognizes (Brief, at p. 13). When Chief Judge John J. Parker, who headed the Judicial Conference committee on this matter, see p. 28 *supra*, testified at the hearings on Section 1292(b), he also limited his reference to antitrust cases to actions for treble damages. *Hearings on H.R. 6238 before Subcommittee No. 3 of the House Committee on the Judiciary*, 85th Cong., 2d Sess. 9 (1958).

[29] The House Report, at pp. 1 to 2, sounds a theme similar to the Senate Report. It first refers to court of appeals jurisdiction over final orders under Section 1291, then notes that some non-final orders may be appealed under Section 1292(a),

do not include those covered by the Expediting Act, any appeal would eventually be to the courts of appeals and Congress believed those appellate courts ought to be able to enter the case at an earlier stage when this would advance termination of the litigation. However, adequate safeguards had to be devised to ensure against abuse and consideration focused upon this subject from 1951 until 1958, when Section 1292(b) finally became law, with its requirements of district court certification and court of appeals authorization.

We return, then, to the language of that provision. As we concluded above,[80] the correct interpretation of Section 1292(b) is that "an order not otherwise appealable" in a "civil action" means an interlocutory order not within Section 1292(a) in a case where the court of appeals would have jurisdiction over an appeal from the final judgment. The legis-

---

and concludes that permitting appeals from other kinds of interlocutory decrees would be desirable.

Both the House and Senate Reports apparently drew heavily from the testimony of Chief Judge Parker at the House hearings on the bill, see note 28 *supra*. Chief Judge Parker clearly indicated that Section 1292(b) was needed to allow court of appeals review of orders that could not otherwise be appealed because of Section 1291's requirement of a final judgment. *Hearings, supra* note 28, at 8. And that of course does not include orders in government civil antitrust cases, which are not appealable to the courts of appeals because of the Expediting Act and the specific exclusion of those cases from Section 1291 and Section 1292(a)(1)—not because of the rule of finality in Section 1291.

[80] See pp. 17 to 19 *supra*.

lative history indicates that this is the premise upon which Congress legislated.

Tidewater argues, however, that since the purpose of both the Expediting Act and Section 1292(b) is to expedite litigation, there is no reason not to read the statutes as supplementing each other (Brief, at p. 12). But the argument ignores that in the Expediting Act Congress sought not simply to expedite government civil antitrust cases, but to do this in a particular way, namely, by routing appeals directly to this Court and by permitting appeals only from final orders.[81] Furthermore, as we pointed out earlier, see pp. 20 to 21 *supra*, Congress gave this Court exclusive jurisdiction over appeals in Expediting Act cases because it deemed such cases particularly important and desired uniformity in appellate decisions on the antitrust issues involved. Review by the courts of appeals in such cases pursuant to Section 1292(b) would directly conflict with these policies, particularly since the courts of appeals would be considering only "controlling questions of law"—the issues on appeal that Congress said this Court, and this Court alone, should decide.

---

[81] See cases cited and discussed at pp. 23 to 24 *supra*.

CONCLUSION

For the reasons stated, the judgment of the court of appeals should be affirmed.

Respectfully submitted.

ERWIN N. GRISWOLD,
Solicitor General.

THOMAS E. KAUPER,
Assistant Attorney General.

A. RAYMOND RANDOLPH, JR.,
Assistant to the Solicitor General.

CARL D. LAWSON,
STEPHEN RUBIN,
Attorneys.

JULY 1972.

☆ U. S. GOVERNMENT PRINTING OFFICE: 1972 470635 975

FILE COPY

SEP 22 1972

MICHAEL RODAK, JR., CLERK

In the Supreme Court of the United States

OCTOBER TERM 1972

No. 71-366

TIDEWATER OIL COMPANY, Petitioner

vs.

UNITED STATES OF AMERICA AND
PHILLIPS PETROLEUM COMPANY

On Writ of Certiorari to the United States Court of Appeals For the Ninth Circuit

Reply Brief of Petitioner Tidewater Oil Company

MOSES LASKY
111 Sutter Street
San Francisco, California 94104

C. LANSING HAYS, JR.
11 Broadway
New York, New York 10004.
Attorneys for Petitioner

Of Counsel:
BROBECK, PHLEGER & HARRISON
HECHT, HADFIELD, HAYS, LANDSMAN & HEAD

BORG PRINTING COMPANY OF CALIFORNIA, 346 FIRST STREET, SAN FRANCISCO 94105

INDEX OF AUTHORITIES

CASES

	Pages
Brown Shoe Co. v. United States, 370 U.S. 294 (1962)	2
California v. Federal Power Commission, 369 U.S. 482 (1962)	4
Cohen v. Beneficial Industrial Loan Corp., 337 U.S. 541 (1949)	2
Fisons Limited et al. v. United States, 458 F.2d 1241 (7 Cir. 1972)	4, 5, 6
Gillespie v. U. S. Steel Corp., 379 U.S. 148 (1964)	2
United States v. Cities Service Company, 410 F.2d 662 (1 Cir. 1969)	2
United States v. FMC Corp., 321 F.2d 534 (9 Cir. 1963)	2
United States v. Ingersoll-Rand Co., 320 F.2d 509 (3 Cir. 1963)	2, 7

STATUTES

Act of June 6, 1900, c. 803, 31 Stat. 660 (amendment to Evarts Act)	1
Evarts Act of 1891 (Act of March 3, 1891, 26 Stat. 828, § 7)	1, 2, 4
Title 15, § 29 (Expediting Act of 1903, Act of February 11, 1903, c. 544, § 2, 32 Stat. 823, as amended)	2, 3, 4, 6, 8
Title 28, § 1292	7
Title 28, § 1292(a)	1, 3, 7, 8
Title 28, § 1292(b) (Interlocutory Appeals Act of 1958)	2, 3, 4, 6, 7, 8

OTHER AUTHORITIES

Page

Address of the Chief Justice at recent American Bar Association meeting 3

5 Harvard Journ. on Legislation 55, 64 (1967) 6

Manual For Complex and Multidistrict Litigation, Sec. 3.3 and 4.1 (printed in 1 Moore's Federal Practice, part 2) 7

Manual For Complex and Multidistrict Litigation (proposed revision of February 1972), Sec. 4.20 7

In the Supreme Court of the United States

OCTOBER TERM 1972

No. 71-366

TIDEWATER OIL COMPANY, Petitioner

vs.

UNITED STATES OF AMERICA AND
PHILLIPS PETROLEUM COMPANY

On Writ of Certiorari to the United States Court of Appeals For the Ninth Circuit

Reply Brief of Petitioner Tidewater Oil Company

From the briefs on file, a number of propositions appear to be without dispute. A succinct enumeration of them serves as a predicate for examining the true nature of the Government's argument.

1. Although the law once frowned on all interlocutory appeals, it can no longer be said that any such all-embracing policy exists. A first breach occured in 1891, when the Evarts Act authorized appeals from orders relative to preliminary injunctions.[1] (Another

1. Act of March 3, 1891, 26 Stat. 828, § 7, the precursor of 28 U.S.C. § 1292(a), extended, in 1900, to orders relative to receiverships, Act of June 6, 1900, c. 803, 31 Stat. 660.

departure has been the development of a broad and pragmatic conception of what constitutes a "final" decree.[2]) A major departure has been the Interlocutory Appeals Act of 1958. 28 U.S.C. § 1292(b). Legislation authorizing an interlocutory appeal is not, therefore, to be construed with animosity.

2. When the Expediting Act was adopted in 1903,[3] application of the Evarts Act to government antitrust cases ceased by the terms of the Evarts Act itself, because that Act authorized an interlocutory appeal only in the class of cases "in which an appeal from a final decree may be taken * * * to the circuit court of appeals", and the Expediting Act removed government antitrust cases from that class. To reach this conclusion no inquiries about wisdom or policy were necessary. The legislative will was expressed in plain English.

3. As the years passed, dispute arose whether orders relative to preliminary injunctions in government antitrust cases had become appealable to the courts of appeals by reason of repeated amendments or re-expressions of the Evarts Act. The Government, through the Department of Justice, was the most earnest proponent of the view that they had become so appealable. Because the legislative history and the text of the several amendments and revisions were murky, the courts of appeal split on the question, the Third Circuit upholding appealability,[4] the First and Ninth Circuits to the contrary,[5] but even the First doubted the desirability of its conclusion. The issue was never presented to this Court, for no party in any of the cases had any incentive to do so.[6]

---

2. See, for example, the line of cases beginning with *Cohen v. Beneficial Industrial Loan Corp.*, 337 U.S. 541 (1949) through *Brown Shoe Co. v. United States*, 370 U.S. 294, 306, 308 (1962) and *Gillespie v. U.S. Steel Corp.*, 379 U.S. 148 (1964).

3. Act of February 11, 1903, c. 544, § 2, 32 Stat. 823 (15 U.S.C. §29).

4. *United States v. Ingersoll-Rand Co.*, 320 F.2d 509 (1963).

5. *United States v. Cities Service Company*, 410 F.2d 662 (1 Cir. 1969); *United States v. FMC Corp.*, 321 F.2d 534 (9 Cir. 1963).

6. See our Opening Brief, p. 17.

4. The Interlocutory Appeals Act, 1958, is a new departure manifesting a radically different attitude toward interlocutory appeals from the former antipathy. Its language is not murky. Yet the Department of Justice, which urged appealability of preliminary injunction orders despite an ambiguous text and an unclear history of 28 U.S.C. § 1292(a), now opposes an appeal under 28 U.S.C. § 1292(b) despite a plain text and a clear history.

5. The Expediting Act is now generally regarded as unwise, and relief of this Court from its burden is an end no one appears to dispute. For example, direct appeal to this Court deprives it of "the benefit of intermediate review by courts of appeal".[7]

We deal below with the arguments by which Government professes to find basis for its present objection.

ANSWER TO GOVERNMENT'S ARGUMENTS

1. The Government seeks to cast the discussion into terms of repeal of the Expediting Act and argues that the Interlocutory Appeals Act of 1958 did not repeal the Expediting Act because a specific statute controls over a general one without regard to priority of enactment (Br. 24, 25). There are two fallacies in this argument. One is an assumption that the Expediting Act is a "specific" act and the Interlocutory Appeals Act is a "general" one. The other is that "repeal" is involved at all, or that anything is being repealed. On the contrary, the Act of 1958 repealed nothing but *added* something. Both the Expediting Act and the Interlocutory Appeals Act are specific acts, the one specific to appeals from *final* judgments in a *certain* kind of suit, and the other specific to *interlocutory* orders in *all* types of suits. The Expediting Act says nothing about interlocutory appeals. It speaks only of an "appeal from the final judgment of the district court." It does not forbid interlocutory appeals in government antitrust suits. Originally interlocutory appeals did not lie in any kind of suit because

7. Quotation from address of the Chief Justice at the recent meeting of the American Bar Association.

of the absence of any statutory provision for them. The reason an appeal from an interlocutory injunctive order did not lie in a government antitrust suit was that the Evarts Act did not provide for it, inasmuch as it provided for an appeal only where the final decree was appealable to the court of appeals. The reason interlocutory appeals from other orders did not lie at all before 1958 was not that the Expediting Act forbade them, but that there was no provision for them.

The principle that repeals by implication are not favored (Government Br. 25) is simply inapplicable. The governing principle of statutory construction is that where there are two acts, effect should be given to both if possible. *California v. Federal Power Commission*, 369 U.S. 482, 485 (1962). As the Seventh Circuit said in the *Fisons* case (458 F.2d at 1245):[8]

> "A plain reading of the two statutes reveals no inconsistency between them. If they had been enacted simultaneously, the language of each could have been given effect without limiting the scope of the other."

2. The underlying motif of the Government's argument is that better legislation than the Interlocutory Appeals Act can be devised to cure the deficiencies of the Expediting Act. Thus it states (Br. 25, fn. 20), "The Attorney General has supported legislation that would amend the Expediting Act to eliminate direct appeals to this Court except in cases of general public importance * * *". It may well be true that some other procedure to advance the desired purposes would be better than Section 1292(b). But until Congress supplies that better procedure, what it has supplied in 1292(b) should not be spurned. Congress had antitrust cases in mind when it enacted Section 1292(b); its Committee reports say so.[9] The existence of so important a part of antitrust litigation as government suits could not have escaped it. Had it intended to

---

8. *Fisons Limited et al. v. United States*, 458 F.2d 1241 (7 Cir. 1972).
9. Quoted at p. 10 of petitioner's opening brief.

exclude application to that type of litigation, it would have said so. As the Seventh Circuit observed in *Fisons,* 458 F.2d at 1245, fn. 6:

> "The many federal judges who participated in the consideration of the proposed legislation, however, were certainly familiar with appellate procedure in both private and Government antitrust litigation, whether civil or criminal."

The Government argues that there is something anomalous about an interlocutory appeal to courts which do not have jurisdiction to review the final judgment; the decision on an interlocutory appeal, the argument runs, is not final (pp. 5, 12-17). One man's anomaly is another man's common sense. The contention had been urged on the Seventh Circuit in the *Fisons* case and was there rejected (458 F.2d at 1247). We answered it in our opening brief here (at p. 25). There is *no* case in which courts of appeal are final; in all cases, whether government antitrust or other, this Court has the final word if it chooses to exercise it. In all non-government antitrust cases it has the benefit of the screening action of the courts of appeals, and no logic can deny that benefit to it in Government antitrust cases. The sole question is whether Congress has permitted it to have that benefit. There is no reason why Congress cannot experiment in dividing up the labor of appellate work, no reason why it could not conclude that interlocutory appeals should be allowed but should be routed through the intermediate courts.

The Government argues that interlocutory appeals will increase this Court's workload because of petitions for certiorari. The Seventh Circuit in the *Fisons* case also rejected this contention (458 F.2d at 1247, 1248). Sooner or later all issues in government antitrust cases, if appealed at all, come to this Court to review; if reviewed once on certiorari at an interlocutory stage, the Court would be spared reviewing them again on final appeal, and if decided on interlocutory appeal, there might be no later

appeal at all. In the meanwhile, the burden on the trial courts and on litigants is lessened.

The Government further argues that there is some lack of harmony between the Expediting Act of 1903 and the Interlocutory Appeals Act of 1958, because a purpose of the Act of 1903 was to eliminate delay. But so also is the purpose of the Act of 1958. The purpose of both Acts is the same, and it is only the means chosen as most suitable which have changed. Wisdom has come from experience.[10] As the Seventh Circuit said (458 F.2d at 1248),

> "* * * the efficacious purpose of § 1292(b) to expedite the ultimate termination of protracted cases justifies its application in Government antitrust litigation * * *".

The Government also asserts that a purpose of the Act of 1903 was to facilitate review by this Court and to obtain uniformity of decision (Br. p. 21). This is doubtless true. But the Government answers its own argument when it proceeds to state (p. 21) that Congress' unwillingness in 1903 to assign jurisdiction to courts of appeal in government antitrust cases "is understandable in light of prevailing reservations about the new federal appellate courts, which in 1903 had been in existence only twelve years." In the next 55 years such reservations vanished. It was seen that in private antitrust litigation (doubtless ignored in 1903 because it was then of no significance) the courts of appeals were fully competent aids to this Court.[11]

---

10. In our opening brief (p. 12) we quoted the following from 5 Harvard Journ. on Legislation, 55 at 64 (1967):

> "The general debate whether section 1292(b) would expedite or delay has been decided by Congress when it adopted that provision. Experience with that section has shown the wisdom of the Congressional decision."

11. In footnote 11, p. 15, the Government's brief belittles the screening benefit of routing interlocutory appeals through courts of appeals on the argument that such appeals often involve procedural matters "presumably" not requiring "extensive analysis of the record." On the contrary, under growing pretrial practice in complicated cases, particularly antitrust, the

3. Another argument of the Government (pp. 6, 17) starts with the assumption, as its first premise, that injunction orders deserve appealability more than other interlocutory orders. As its minor premise it assumes that under 28 U.S.C. § 1292 no appeal from orders relating to preliminary injunctions lies in a government antitrust suit. From these premises it concludes that § 1292(b) does not permit appeals in government antitrust suits because that result would be an oddity. But the syllogism fails in both premises and in the conclusion.[12] The premise that appeals from interlocutory injunctive orders do not lie in government antitrust suits is sought to be derived from the fact that § 1292(b) relates by its terms to "an order not otherwise appealable under this section" (i.e., under any part of § 1292). But, in the first place, it may be that an interlocutory appeal from an injunctive order in a government antitrust suit lies under § 1292(a), as the Government itself believed when § 1292(b) was enacted in 1958 and as held by the Third Circuit in 1963. And, in the second place, if an appeal from such an order cannot be under § 1292(a), it may be taken under § 1292(b). Section 1292(b) relates to orders not appealable under 1292(a), whatever the nature of the order and whatever the reason for its non-appealability. In cases in which a final decree is appealable to a court of appeals, 1292(a) covers appeals from interlocutory injunctive orders, and the appeal may be taken as of right; no recourse to § 1292(b) is available but neither is it necessary. But

---

parties in advance of trial list and exchange their proposed exhibits, the names of witnesses, and a digest of testimony, and they are required to state their objections in advance; pretrial ruling on objections is made. The Manual For Complex and Multidistrict Litigation (printed in 1 Moore's Federal Practice, part 2) provides for this practice (Sec. 3.3 and 4.1), and the proposed revision of February 1972 extends it further (Sec. 4.20). Evidentiary rulings made on this mass of data are least adapted to review by this Court and most burdensome; yet they can be vital to a case. Pretrial disposition of evidentiary questions, reviewed on interlocutory appeal by a court of appeals, can be invaluable.

12. The first premise and the conclusion are value judgments, and Congress' failure to provide an appeal in all situations would be no reason to deny an appeal in a situation where Congress has provided it.